Supreme Court, U. S.
FILED
JUL 25 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1267

EXAMINING BOARD OF ENGINEERS, ARCHITECTS AND SURVEYORS, COMPOSED OF ITS MEMBERS PEDRO SANTIAGO RIVERA, LEONEL A. FERNANDEZ, GENARO NEGRON, JUAN M. PORTELO SOLER, GUILLERMO CRUZ AND MILTON CASTRO NAZARIO, *Appellants*

v.

MARIA C. FLORES DE OTERO, *Appellee*

BOARD OF EXAMINERS OF ENGINEERS, ARCHITECTS AND SURVEYORS, AND THE MEMBERS OF SUCH BOARD, *Appellants*

v.

SERGIO PEREZ NOGUEIRO, *Appellee*

On Appeal from the United States District Court for the District of Puerto Rico

BRIEF OF APPELLANTS

MIRIAM NAVEIRA DE RODON
Solicitor General

PETER ORTIZ
Deputy Solicitor General

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

SUBJECT INDEX

Page

Opinion Below 1

Jurisdiction 2

Questions Presented 2

1. Whether the District Court Had Jurisdiction Over These Complaints Pursuant to Title 28, United States Code, Section 1343(3)(4). 2

2. Whether the District Court Should Have Abstained from Passing upon the Interpretation and Validity of the Statute Involved. 2

3. (a) Whether the Strict Tests of Judicial Scrutiny Regarding 'State' Classifications of Aliens Is Fully Applicable to Statutes Enacted by Commonwealth Legislature, or 2

(b) If They Are Applicable, Whether the Statute Herein Complies with the Criteria Set Forth In In Re Griffiths, 413 U.S. 717, 93 S.Ct. 2851, 37 L.Ed.2d 910 (1973) 3

Statutes Involved 3

Statement 3-5

Argument 6

Point A: The District Court Erred in Holding That it had Jurisdiction Founded Upon 42 USC 1983 and 28 USC 1343 6-14

Point B: The District Court Should Have Abstained From Reaching The Merits Of The Constitutional Claim 14-17

Point C: The Court Erred In Applying The Compelling State Interest Test To The Commonwealth Statutes And/Or It Erred In Rejecting the Justification Advanced By Appellants 17-22

Conclusion 22

TABLE OF CASES

	Page
Acevedo v. Colón, 377 F. Supp. 1332	7
Amézquita v. Hernández Colón, No. 74-1345, 378 F.S. 737 (Slip Opinion of June 20, 1975)	6, 7
Arias v. Examining Board of Refrigeration and Air Condition Technicians, 353 F. Supp. 857 (DPR 1972)	4
Arvelo v. Supreme Court, 382 F. Supp. 510	7
Balzac v. Puerto Rico, 258 U.S. 298, 66 L.Ed. 627, 42 S.Ct. 343 (1922)	12
Bonet v. Texas Co., 388 U.S. 463, 471, 84 L.Ed. 401, 60 S.Ct. 349	16
Brown v. Pitchess (Calif. Supreme Court, 2-19-75, 16 Cr. L. 2516)	10, 12
Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, reh. den. 417 U.S. 977	2, 10, 12, 13, 16, 18
Caribtow Corp. v. Occupational Safety and Health Review Comm., 493 F.2d 1064 (1 CA 1974)	13
Dandridge v. Williams, 397 U.S. 471, 25 L.Ed.2d 491 (90 S.Ct. 1153 (1970))	22
District of Columbia v. Carter, 409 U.S. 418, 34 L.Ed.2d 613, 93 S.Ct. 602 reh. den. 410, U.S. 959, 35 L.Ed.2d 694, 93 S.Ct. 1411 (1973)	6, 11, 12, 14
Doctor's Hospital v. Silva, 383 F. Supp. 736	8
Espinosa v. Farah Manufacturing Co. Inc., 414 U.S. 86, 38 L.Ed.2d 287, 94 S.Ct. 334 (1973)	5, 21
Fornaris v. Ridge Tool Co., 400 U.S. 41, 27 L.Ed.2d 174, 91 S.Ct. 156 (1970)	12, 13, 14, 16
Gabriel v. Benítez, 390 F. Supp. 988	7
García Mercado v. Superior Court, 99 P.R.R. 287	9
González v. González, 385 F. Supp. 1226	7
Harris County Comm. Court, et al v. Moore, US , 43 L.Ed.2d 32 (1975)	14, 15
Hodgson v. Unión Empleados de los Supermercados Pueblo, 371 F. Supp. 56 (DPR 1974)	13, 14
In Re Griffiths, 413 U.S. 717, 37 L.Ed.2d 910, 93 S.Ct. 2851 (1973)	4, 5, 17, 18, 21
Insular Police Comm. v. López, 160 F.2d 673 (1 CA 1947)	13
Keystone Collection v. Silva, 388 F. Supp. 304	8
King v. Conservatory, 378 F. Supp. 746	7
Liquilux Gas Services of Ponce, Inc. v. Tropical Gas Co., 303 F. Supp. 414 (DPR 1959)	13

	Page
M.T.M., Inc. v. Baxley, etc., 416 U.S. 663, 43 L.Ed.2d 636	2
Marín v. U.P.R., 377 F. Supp. 613 (1973)	6, 7, 10
Mongil Suárez v. Administrador del Deporte Hípico, 354 F. Supp. 320 (DPR 1972)	12
Montalvo v. Colón, 377 F. Supp. 1332, 1340 (DPR 1974)	14
Mora v. Torres, 11 3F. Supp. 309, 319 (DPR 1953)	14
N.L.R.B. v. Security National Life Insurance Co., 494 F.2d 336	13
Oppenheimer v. Méndez, 388 F. Supp. 326	7
Oquendo v. Ramos-Ortiz, 372 F. Supp. 79	8
Ortiz v. Hernández Colón, 511, F.2d 1080	6, 9
Ortiz v. Hernández Colón, 385 F. Supp. 111	7
P.P.D. v. Ferré, 98 P.R.R. 331 (1970)	9
Pagán Hernández v. Supreme Court, 385 F. Supp. 130.	7
Palmore v. United States, 411 U.S. 389, 36 L.Ed.2d 342, 93 S.Ct. 1670 (1973)	12
Pérez Aldarondo v. Superior Court, Feb. 20, 1974	9
Pérez v. González, 378 F. S. 737	7
Ramos v. United States Civil Service Comm., 376 F. Supp. 361 (DPR 1974)	18, 21
Rasa Eng. Corp. v. Daubón, 86 P.R.R. 182 (1962)	21
Reets v. Bozanich, 397 U.S. 82	15
Rivera v. Chapel, 366 F. Supp. 691, 493 F.2d 1302 (1 CA 1974)	7
Sánchez v. United States, 376 F. Supp. 239 (DPR 74)	7, 14
Sugarman v. Dougall, 413 U.S. 634 (1973), 37 L.Ed.2d 910, 93 S.Ct. 2842	18, 21
Torres v. Delgado, 510 F.2d 1182 (1 CA 1975)	7
Vargas v. Barceló, 385 F. Supp. 879	7
Vega v. Secretary, 384 F. Supp. 674	7
Vélez v. Martínez, 510 F.2d 605	7
Wackenhut, 386 U.S. 268	16
Wong Sun v. Hampton, 500 F.2d 1031 (9 CA 1974) cert. granted 41 L.Ed.2d 664	18, 21
Zwickler v. Koota, 389 U.S. 241, 248-50 (1967) 19 L.Ed. 2d 444 (1967), 88 S.Ct. 391	4, 11, 17

TABLE OF AUTHORITIES

Page

STATUTORY PROVISIONS:

Constitution of the United States:
- Article I, Sec. 8, cl. 17 12
- Article II, Sec. 7 15
- Fifth Amendment 3
- Fourteenth Amendment 3

Civil Code, Article 1483 15

Law Number 9 of April 13, 1964 17

Law 600, 64 Stat. 319, 66 Stat. 327 .....8, 12

Laws of Puerto Rico Annotated:
- 4 L.P.R.A. 62 12
- 17 L.P.R.A. 501 to 519, as amended by Law 116 of June 7, 1963 (1974 Cumulative Pocket Supplement, 17 L.P.R.A. 516, at page 6) 20
- 20 L.P.R.A. 689 3
- 31 L.P.R.A. 4124, Civil Code Article 1483...4, 5, 15, 20
- Vol. 4A, 1973 Supplement, pp. 226-228 3

Public Law 88-271 of February 20, 1964 17

28 U.S.C. 1253 2
28 U.S.C. 1257 .....12, 13
28 U.S.C. 1258 9
28 U.S.C. 1331, 1332, 2254 6
28 U.S.C. 1343 .....2, 4, 8, 10, 14
28 U.S.C. 2101(b) 2
28 U.S.C. 2281 13
42 U.S.C. 1981 14
42 U.S.C. 1983 .....2, 4, 8, 10, 11
48 U.S.C. 731d 8, 12
48 U.S.C. 734, Federal Regulations Act 14

TEXTS:

Leibowitz, The Applicability of Federal Law To The Commonwealth of Puerto Rico, 56 GEO. L. J. 219 (1967) 13

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1267

EXAMINING BOARD OF ENGINEERS, ARCHITECTS AND SURVEYORS, COMPOSED OF ITS MEMBERS PEDRO SANTIAGO RIVERA, LEONEL A. FERNANDEZ, GENARO NEGRON, JUAN M. PORTELO SOLER, GUILLERMO CRUZ AND MILTON CASTRO NAZARIO, *Appellants*

v.

MARIA C. FLORES DE OTERO, *Appellee*

BOARD OF EXAMINERS OF ENGINEERS, ARCHITECTS AND SURVEYORS, AND THE MEMBERS OF SUCH BOARD, *Appellants*

v.

SERGIO PEREZ NOGUEIRO, *Appellee*

On Appeal from the United States District Court for the District of Puerto Rico

BRIEF OF APPELLANTS

TO THE HONORABLE COURT:

OPINION BELOW

The Opinions of the District Court for the District of Puerto Rico are not yet reported. Copies of the Opinions and Orders are printed as Appendixes A

and B of the Jurisdictional Statement (Pages 1a to 7a of App.).

JURISDICTION

These suits were brought pursuant to 28 USC 1343 based upon causes of action under 42 USC 1983. Three Judge Courts were requested to enjoin the enforcement of section 689 of Title 20 of the Laws of Puerto Rico Annotated in that the citizenship requirement to practice engineering and related professions in the Commonwealth was unconstitutional. (See complaints, Appendix pages 2 and 3). The judgments of the District Court were entered on December 19, 1974 and February 5, 1975 and we filed our Notices of Appeal on January 22, 1975 and March 10, 1975 respectively. The jurisdiction of this Court over these appeals is conferred by 28 USC 1253 and 28 USC 2101(b). See *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 US 663, reh. den. 417 US 977; *M.T.M., Inc.* v. *Baxley, etc.*, 416 U.S. 663, 43 L.Ed. 2d 636. Probable jurisdiction was noted by this Court on May 27, 1975.

QUESTIONS PRESENTED

1. Whether the District Court Had Jurisdiction Over These Complaints Pursuant to Title 28, United States Code, Section 1343(3)(4).

2. Whether the District Court Should Have Abstained From Passing Upon the Interpretation and Validity of the Statute Involved.

3. (a) Whether the Strict Tests of Judicial Scrutiny Regarding 'State' Classifications of Aliens is Fully Applicable to Statutes Enacted By Commonwealth Legislature, or

(b) If They are Applicable, Whether the Statute Herein Complies With the Criteria Set Forth In In Re Griffiths, 413 U.S. 717, 93 S.Ct. 2851, 37 L.ed. 2d 910 (1973).

STATUTES INVOLVED

The local statute can be found as Appendix E of the Jurisdictional Statement and is officially reported on 20 LPRA 689, pages 226 to 228 of the 1973 Supplement to Volume 4A of the Laws of Puerto Rico Annotated.

STATEMENT

María C. Flores de Otero is a native of Mexico, not a citizen of the United States and resides in Puerto Rico. Her applications for registration as a licensed engineer were denied on the basis of her lack of United States citizenship. She brought an action in the United States District Court for the District of Puerto Rico seeking that section 689 be adjudged unconstitutional for being in conflict with the due process and equal protection clauses. The complaint did not specify which Amendment, the Fifth or Fourteenth of the United States Constitution is applicable. She also sought injunctive relief. A Three-Judge Court was convened and it entered judgment in her favor.

Sergio Pérez Nogueiro is a native of Spain who is residing as an alien in Puerto Rico. He is presently working as an engineer for the Municipality of Carolina pursuant to a conditional license granted by the Board, as authorized by the statute. He brought this action seeking a full unconditioned license to practice as an engineer in the Commonwealth. Judgment was entered in his favor, on the basis of the prior judgment in the María C. Flores de Otero case.

Section 689 provides that in addition to the educational and experience requirements, it shall be required that applicants for registration be citizens of the United States of America and reside in the Commonwealth of Puerto Rico for no less than a year before filing of their applications. It further provides that the citizenship requirement shall not apply to applicants who have studied the total courses and have received their grade or certificate in the Commonwealth. The citizenship requirement does not apply to applicants whom the agencies and instrumentalities of the Commonwealth Government, its municipalities and public corporations employ or wish to employ. These aliens are granted a conditional certificate to practice their professions in those public entities.

In its opinion the District Court found jurisdiction upon 42 U.S.C. 1983 and 28 U.S.C. 1343. It refused to abstain and wait for an interpretation by the Commonwealth courts because in its view the citizenship requirement is clear and unmistakable and no conceivable gloss placed upon it by the local courts could turn aside the argument that the classification is unconstitutional. The Court cited in support of its conclusion, *Zwickler* v. *Koota,* 389 U.S. 241, 248-50 (1967), and *Arias* v. *Examining Board of Refrigeration and Air Cond. Technicians,* 353 F. Supp. 857 (D.P.R. 1972).

On the merits, the District Court applied the strict test used by this Honorable Court in *In Re Griffiths,* 413 U.S. 717, 37 L.Ed. 2d 910, 93 S.Ct. 2851 (1973), which held that a State classification based upon alienage is suspect even if used to regulate entry to a profession, and the State has to show a compelling interest which is both constitutional, permissible and substantial and that the classification is necessary to achieve

the purpose or safeguard its compelling interest. By using such a strict test, the Court found that the interest invoked by the Commonwealth did not justify the classification. It rejected the argument that the Commonwealth had to protect itself against an uncontrollable invasion of alien engineers. It also held that the classification had no reasonable relationship with Article 1483 of the Civil Code, 31 L.P.R.A. 4124.[1] Said article imposes liability upon contractors for damages caused by them within ten years of the construction of the building work, etc.

The Court also rejected the contention that this Court had repudiated its holding in *In Re Griffiths, supra,* and similar cases, when it decided *Espinosa* v. *Farah Manufacturing Co.,* 414 U.S. 86, 38 L.Ed.2d 287, 94 S.Ct. 334 (1973).

Thus the decisions declared the statute invalid; enjoined appellants from enforcing it and ordered them to grant unconditioned licenses to appellees.

---

[1] Said Article reads as follows:

"The contractor of a building which may have been destroyed by reason of defects in the construction shall be liable for the losses and damages if said building should collapse within ten years, to be counted from the completion of the construction; and during the same time the same liability shall be incurred by the architect who may have directed the work if the collapse is due to defects in the ground or in the direction.

If the cause should be the noncompliance of the contractor with the conditions of the contract, the action for indemnity may be brought within fifteen years".

ARGUMENT

POINT A: The District Court Erred in Holding That it had Jurisdiction Founded Upon 42 USC 1983 and 28 USC 1343.

The crux of our argument is the contention that Puerto Rico is not a "State or Territory" for the purposes of the Civil Rights Statutes herein invoked. It should be made crystal clear at the outset that we are only objecting to the assumption of jurisdiction by the federal courts under these statutes. We are not here concerned with the general jurisdiction of the local District Court under statutes such as 28 U.S.C. 1331, 1332 and 2254. We are not in any manner or form advocating the abolishment of the Court itself. We repeat that our contention is strictly based upon the scope and intent of the Civil Rights Acts and their jurisdictional counterpart. We submit that Congress never intended, or at least did not intend to do so after 1952, to subject all the local statutes, rules, ordinances and official acts of the public officials of the Commonwealth to the strict supervisory powers of the lower federal courts. The main basis for our reasoning stems from the interpretation of these statutes made by this Hon. Court in cases such as *District of Columbia* v. *Carter,* 409 U.S. 418, reh. den. 410 U.S. 959 (1973). Although the Court of Appeals for First Circuit has rejected this contention in *Ortiz* v. *Hernández Colón,* 511 F.2d 1080 (1975), and *Amézquita* v. *Hernández Colón,* No. 74-1345 (Slip. Opinion of June 20, 1975), we submit that that Court and the District Court in *Marín* v. *U.P.R.,* 377 F. Supp. 613 (1973), misconstrued our contention or its reasoning. Without an extensive analysis those Courts assumed that the residents of Puerto Rico are in the same position as those citizens who reside in the 50 states. This is an obvious error. Puerto Ricans are not in parity with other United States citizens in respect to their

duties, obligations and rights. Perhaps the most evident of our differences is that we do not have the duty or right to vote in federal elections. See in this respect, *Sánchez* v. *U.S.,* 376 F. Supp. 239 (DPR 1974).

The need for a conclusive and clear decision of this matter is evident. During the last two or three years the local federal court has been flooded with a wide variety of cases which directly or indirectly pretend to affect and question local public polity decisions. A short summary of a few of the published opinions follows:

1. *Rivera* v. *Chapel,* 366 F. Supp. 691, 493 F.2d 1302 (1 CA 1974), questioning the price fixing powers of the local officials.
2. *Torres* v. *Delgado,* 510 F.2d 1182 (1 CA 1975) *Vélez* v. *Martínez,* 510 F.2d 605, jury provisions in criminal cases.
3. *Oppenheimer* v. *Méndez,* 388 F. Supp. 326; *González,* v. *González,* 385 F. Supp. 1226; *Gabriel* v. *Benítez,* 390 F. Supp. 988, *King* v. *Conservatory,* 378 F. Supp. 746; *Vargas* v. *Barceló,* 385 F. Supp. 879 (Personnel laws of Puerto Rico).
4. *Acevedo* v. *Colón,* 377 F. Supp. 1332—abortion sections of the local Penal Code.
5. *Arvelo* v. *Supreme Court,* 382 F. Supp. 510, *Pagán Hernández* v. *Supreme Court,* 385 F. Supp. 130, (Bar examination procedures).
6. *Ortiz* v. *Colón,* 385 F. Supp. 111,—statutes for selection of municipal assembly.
7. *Amézquita* v. *Colón,* 378 F. S. 737, state policy on the squatter problem.
8. *Peréz* v. *González,* 378 F. Supp., *Marín* v. *U.P.R.* 377 F. Supp. 613, *Vega* v. *Secretary,* 384 F. Supp. 674 (Student and professor regulations).

9. *Doctor's Hospital* v. *Silva,* 383 F. Supp. 736; *Keystone Collection* v. *Silva,* 388 F. Supp. 304 (Labor Laws of the Commonwealth).

10. *Oquendo* v. *Ramos-Ortiz,* 372 F. Supp. 79 (Injunction against pending criminal proceedings).

The above is just an illustrative list of the many cases which have been brought before the federal courts. There are many more published and unpublished which deal with a significant number of local statutes and actions by local officers. They are not herein cited for any precedential value. But they do have two important aspects in common. Although plaintiffs in all these cases tried to invoke a federal question, and the court so found in some of them, they uniformly dealt with statutes or actions which were purely local in their nature and application. That is, they only affected purely internal matters. The other common trait was that none of them presented questions of violations on account of race, religious belief or creed, or political philosophy or preference of plaintiffs therein, which were the main concerns of the civil rights statutes.

Thus there is a legitimate concern within the legal, political, professional and business circles of the Commonwealth of Puerto Rico as to the applicability of the civil rights statutes over purely local, internal matters.

We submit that an unqualified holding that the Commonwealth is a "State or Territory" for the purposes of 28 USC 1343 and USC 1983, would seriously undermine the Congressional intent of Law 600, 64 Stat. 319, 66 Stat. 327, note, 48 USC 731d, as later clearly expressed by the majority of the Puerto Rican people in the status plebiscite held in 1967 as well as the goals achieved by the Commonwealth in its search for further

autonomy in local matters.[2] This would be so because the local federal court would continue to be the arbiter of the validity of most of the local statutes, ordinances, regulations and official government actions. We submit that this role should be left to the Supreme Court of Puerto Rico and ultimately to this Hon. Court through its appellate powers under 28 USC 1258. The above would not, in any manner award less rights to the local residents. They would have full opportunities to seek redress for the deprivation of their federal and local constitutional rights through the local courts.

Entering into the merits of the jurisdictional question, we submit that the approach taken in previous decisions which have rejected the Commonwealth's position does not take into account the special status of the Commonwealth, the nature of the present relationship and the intent and scope of the civil rights statutes.

The most recent decision in *Ortiz* v. *Hernández Colón,* 511 F.2d 1080, reasoned as follows:

> "The citizens of the several states are permitted to seek redress in the federal courts for deprivation of their rights under color of state law without first seeking relief in the state courts. Monroe v. Pape, 1961, 365 U.S. 167, 183. We yield to no one in our regard for the Supreme Court of Puerto Rico, but at the same time, if citizens of the several states may call for an initial decision in the district court

---

[2] For an excellent historical analysis of this search and the achievements attained see, *P.P.D.* v. *Ferré,* 98 P.R.R. 331 (1970) especially the opinions by Justices Santana Becerra and Rigau which are reported at pages 377-401, 421-437. See also generally as to the concept and meaning of the present Commonwealth status, *Pérez Aldarondo* v. *Superior Court,* (February 20, 1974) and *García Mercado* v. *Superior Court,* 99 P.R.R. 287. (We are attaching copies of their official translations of these opinions.) See specially the discussion in *García Mercado,* pages 294 et seq.

> without deferring to the courts of their local state, we must wonder how we could conscientiously hold that under 28 U.S.C. § 1343 United States citizens resident in Puerto Rico are any less entitled."

A similar approach was used in *Marin* v. *U.P.R.*, 377 F. Supp. 613 (D.P.R. 1973). We respectfully submit that the comparison with the citizens of the 50 states is ill founded. As we shall further elaborate, for the purposes of § 1343 the residents of Puerto Rico should be treated in the same manner as those residing in the District of Columbia. The latter are not in an inferior position in respect to the quest of redress for deprivations of their civil rights. Rather it is only a matter of the forum where the actions are to be brought. This is specially so if it is considered that there is nothing preventing state courts from entertaining and deciding civil rights actions brought under 42 USC 1983. *Brown* v. *Pitchess* (California Supreme Court, 2-19-75, 16 Cr. L. 2516). And the Commonwealth courts can enter injunctions for violations of civil rights. See Law No. 12 of August 8, 1974.

In *Calero-Toledo, supra,* 40 L.Ed.2d at 464, ft. 11, this Court expressed that:

> "We have no occasion to address the question whether Puerto Rico is a 'State' for purposes of 28 U.S.C. 1343 (28 USCS 1343), a jurisdictional basis of appellee's complaint."

It did not reach the question because jurisdiction was found to exist under 28 U.S.C. 1331. In this case the only jurisdictional basis is 28 U.S.C. 1343(3). This by itself establishes that this question is so substantial as to require plenary consideration, and a definite decision of the issue. Section 1343 came into being as part of the

Civil Rights Acts enacted during the late 1860's and early 1870's. It was one of the means established to award jurisdiction to the federal courts over actions against the State to redress deprivation of constitutional rights which were mostly uncontrolled after the Civil War. Together with the predecessor of 42 U.S.C. 1983, it was enacted to vindicate rights protected by the Fourteenth Amendment. For a historical view of 1343, see *Zwickler* v. *Koota,* 389 U.S. 241, 19 L.Ed.2d 444 (1967), 88 S.Ct. 391.

In this case jurisdiction under 1343 depends upon the applicability to the Commonwealth of Art. 1 of the Civil Rights Act, 42 U.S.C. 1983. *District of Columbia* v. *Carter,* 409 U.S. 418, 34 L.Ed.2d 613, 93 S.Ct. 602, reh. den. 410 U.S. 959, 35 L.Ed.2d 694, 93 S.Ct. 1411 (1973), held that the District of Columbia was not a "State or Territory" within the purposes of 42 U.S.C. 1983 and that the District Court lacked jurisdiction over a claim based upon that section. The Court made a complete historical analysis of the Civil Rights Acts and found that 1983 was enacted as a means to "enforce the provisions of the Fourteenth Amendment", *Carter, supra,* 34 L.Ed.2d at 619. Since the District is not a State within the meaning of the Fourteenth Amendment, neither the District nor its officers are subject to its restrictions. Thus this Court held that section 1983 is not applicable to the District. This was based upon an extensive examination of the legislative history of 1983 and the nature of the District of Columbia.

As to the legislative history of section 1983, there is no question that the evils which it sought to correct were ever present in Puerto Rico. On the contrary both before and after the birth of the Commonwealth in Puerto Rico, the local courts have had the power and

the willingness to protect and enforce federal rights. See *Mongil Suárez* v. *Administrador Deporte Hípico,* 354 F. Supp. 320 (DPR 1972); 4 L.P.R.A. 62. Note also that state courts can decide civil rights actions. *Brown* v. *Pitchess,* California Supreme Court, 2/19/75, 16 Cr. L. 2516.

Like the District, the Commonwealth is truly *sui generis* within the national governmental structure, *Carter, supra.* 34 L.Ed.2d at 625. It is significant that this Court has compared the nature of the District with that of the Commonwealth. *Palmore* v. *United States,* 411 U. S. 389, 36 L.Ed.2d 342, 93 S.Ct. 1670 (1973), where this Court recognized that the District of Columbia is constitutionally distinct from the States and following *Fornaris* v. *Ridge Tool Co.,* 400 U.S. 41, 27 L.Ed.2d 174, 91 S.Ct. 156 (1970), held that a statute of the District is not a State statute for the purposes of 28 U.S.C. 1257. The Court also held that the rationale of *Balzac* v. *Puerto Rico,* 258 U.S. 298, 66 L.Ed. 627, 42 S.Ct. 343 (1922), and that a Puerto Rican statute was a State statute for purposes of appeal was severely undermined in *Fornaris.* The situation herein is similar to the one present in *Fornaris* and *Palmore.* That is, sections 1983 and 1343 should not be held applicable to the Commonwealth in the absence of a more definitive guidance from Congress. *Palmore,* 36 L.Ed.2d, at page 351.

Although the source of congressional power over the District, (Art. 1, sec. 8, cl. 17 of the Constitution) is different than the one in Puerto Rico, both possess different traits than the States or Territories. The source of Congressional power over the Commonwealth is the compact between the United States and Puerto Rico (Public Law 600) *Calero-Toledo, supra.* Thus the

question as to whether a particular Congressional enactment is applicable to Puerto Rico has to be answered in terms of the Compact. That is, whether their applicability is consonant with the Compact. See *Caribtow Corp.* v. *Occupational Safety and Health Review Comm.,* 493 F.2d 1064 (1 CA, 1974); *N.L.R.B.* v. *Security National Life Ins. Co.,* 494 F.2d 336, *Hodgson* v. *Union Empleados de los Supermercados Pueblo,* 371 F. Supp. 56 (DPR 1974); *Liquilux Gas Services of Ponce, Inc.* v. *Tropical Gas Co.,* 303 F. Supp. 414 (DPR 1969) and cases cited therein. For a pre-Commonwealth decision refusing to apply the Civil Rights Acts to Puerto Rico, see *Insular Police Comm.* v. *López,* 160 F.2d 673—(1 CA 1947). And see, *Leibowitz,* the Applicability of Federal Law To The Commonwealth of Puerto Rico, 56 GEO. L. J. 219 (1967).

That same flexible approach has been used by this Court. Compare *Fornaris* v. *Ridge Tool Co., supra* (Puerto Rico not a State for the purposes of this Court's appellate powers, 28 U.S.C. (1257) and *Calero-Toledo, supra,* (Puerto Rico is a State for the purposes of the Three-Judge-Court Act, 28 U.S.C. 2281) In neither of these two cases did this Court find it necessary to express whether the Fifth or Fourteenth Amendment is applicable to Puerto Rico.

Thus the question of the applicability of the Civil Rights Statutes, depends upon an interpretation of the Compact and the pertinent statutes. This Court recognized in *Calero-Toledo* that the Compact had brought about significant changes in Puerto Rico's governmental structures, the main one being a much higher degree of autonomy and sovereignty over purely local matters. This novel political experiment strengthened the relationship between Puerto Rico and the Federal govern-

ment and has turned the Island into a highly unique and *sui generis* structure within the United States federal system. It would be inconsistent with the deference shown by Congress and this Court to Puerto Rico's government and with the changes of the political structure brought about by the Compact, to subject all the local statutes and actions to the strict supervisory powers of the federal courts as if we were a State or Territory.

While Puerto Rico possesses a higher degree of sovereignty than the District, Congress still possesses power to legislative over it, due to the provision of the Federal Relations Act, 48 U.S.C. 734, which continued in effect by virtue of the Compact.

Because Puerto Rico is not a "State" within the full meaning of that term; *Fornaris, supra; Sánchez* v. *U. S.*, 376 F. Supp. 239 (DPR 1974); *Mora* v. *Torres*, 113 F. Supp. 309, 319 (DPR 1953), or a Territory, within the constitutional context used in the *Carter* case; *Montalvo* v. *Colón*, 377 F. Supp. 1332, 1340[3] (DPR 1974), *Hodgson, supra*, neither the Civil Rights Act, 42 U.S.C. 1981, 1983 nor its jurisdictional counterpart, 28 U.S.C. 1343 are applicable to Puerto Rico.

POINT B: The District Court Should Have Abstained from Reaching the Merits of the Constitutional Claim

The Court below declined to abstain because the statute was clear and free from doubt. As this Court recently held, *Harris County Comm. Court, et al.* v. *Moore*, abstention is appropriate where the uncertain status of local law stems from the unsettled relation-

[3] See ft. 23 at 1341-42 for Judge Coffin's view on the applicability of constitutional safeguards to the Commonwealth which are consonant with the flexible approach urged by appellants.

ship between the state constitution and a statute. In the case at bar the relationship is two fold. First of all, appellants argued that the classification excluding aliens is justified by the provisions of Article 1483 of the Civil Code, which deals with causes of action against engineers, architects, etc. It is evident that there is a significant relationship between the two. But it is uncertain whether the exclusion is justified, under local law, by the Civil Code provisions. No pertinent decision by the local court exists which deals with the question whether the exclusion is necessary to give effect to the protections established by Article 1483. There is also a close relationship between the statute and the local Constitution. The local Court has not had the opportunity to analyze, in the context of this case, the scope of section 1 of Article I of our Constitution which establishes that "No discrimination shall be made on account of race, color, sex, birth, social origin or condition, or political or religious ideas."

The Supreme Court of Puerto Rico should have the opportunity of interpreting whether the statutory exclusion conflicts with this prohibition against discrimination due to birth or origin, together with the general clause as to equal protection of the laws. Article II, section 7 of the Constitution and whether it is justified by the Civil Code provision. As shown by *Moore, supra*, and *Reets* v. *Bozanich*, 397 U.S. 82, abstention is not only required when the statute needs interpretation as to its meaning. It is also mandated when the scope and validity of the statute is unclear under the local constitution and/or related statutes.

We submit that the *Moore* decision *supra*, has expanded the abstention doctrine in a manner favorable

to the States. This is more so in the case of Puerto Rico, where this Court has consistently used a far more liberal test in favor of the local construction of its laws. *Fornaris, supra, Wackenhut,* 386 US 268, cited with approval in *Calero-Toledo, supra.* In *Wackenhut, supra,* the District Court expressly held that:

> "'application of the doctrine of abstention is particularly appropriate in a case. . .involv(ing) the construction and validity of a statute of the Commonwealth of Puerto Rico. For a due regard for the statutes of the Commonwealth under its compact with the Congress of the United States dictates, we believe, that it should have the primary opportunity through its courts to determine the intended scope of its own legislation and to pass upon the validity of that legislation under it own constitution as well as under the Constitution of the United States."

This criteria was adopted with the specific holding that the special regard due to the Commonwealth warrants absention. If this reality is considered with the pre-Commonwealth respect and deference given by this Court to the local interpretations of the Civil Code and related statutes,[4] then the absention doctrine is even more appropriate.

In addition, abstention is more appropriate here because it would serve to avoid "the hazard of unsettling some delicate balance in the area of federal-state

[4] "Out of that experience grew a pronouncement that a Puerto Rican Court should not be overruled on its construction of local law unless it could be said to be 'inescapably wrong'. See *Bonet* v. *Texas Co.,* 308 U.S. 463, 471, 84 L. Ed. 401, 60 S. Ct. 349". *Fornaris* v. *Ridge Tool, supra,* 27 L. Ed. 2d at 177.

relationships"; Justice Harlan's concurrent opinion in *Zwickler* v. *Koota,* 389 U.S. 241, 19 L.Ed. 444, 454-55, 88 S.Ct. 391. Abstention in cases dealing with Commonwealth statutes clearly serves this purpose. It should be specially noted that an Ad Hoc Commission has been named to study the special relationship between Puerto Rico and the United States for the purpose of studying, of proposing legislation, and formulate recommendations tending to satisfy the aspirations of the people freely expressed in the 1967 plebiscite.[5]

In this particular case abstention is appropriate because the local ruling could avoid the necessity of passing upon the federal claim. If the statute is found unconstitutional, no further litigation is needed. On the other hand if a justification is found, then the only aspect remaining would be if the same meets the pertinent tests.

POINT C: The Court Erred in Applying the Compelling State Interest Test to the Commonwealth Statutes and/or it Erred in Rejecting the Justification Advanced by Appellants.

The District Court applied the strict test of compelling state interest following the holding in *In Re Griffiths* that classifications limiting aliens' rights and opportunities are suspect. While that test might be

[5] This Commission is a consequence of congressional action contained in Public Law 88-271 of February 20, 1964 and the action of the Legislature of Puerto Rico Law Number 9 of April 13, 1964. The present Joint Committee was appointed upon the request of the Government of Puerto Rico by the President of the United States and the Governor of Puerto Rico. Among the areas under study is the problem of aliens' entry into Puerto Rico.

appropriate in dealing with the 50 States,[6] both the general nature of the Commonwealth status and the specific factual situation in regards to the aliens' presence in Puerto Rico, warrant a different approach.

We have already extensively cited the cases which recognize the special status of the Commonwealth of Puerto Rico. It is a truly unique relationship and a new concept in the constitutional scheme of this country. Thus the Court should not have automatically applied the same criteria applied to the States, especially where the States are governed by the 14th Amendment, which has never been expressly held to apply to the Commonwealth. *Calero-Toledo, supra,* ft. 5 at 40 L.Ed. 2d 460. There the Court extended to Puerto Rico's statutes the same deference as state statutes, but that does not mean that the same test of construction is to govern both situations. Because the uniqueness of the contitutional and political relationship between the two sovereignties, purely local statutes should not be overturned unless there is no justification for them or its unconstitutionality is so obvious on its face and the government authority of the Commonwealth would be so untrammeled by the requirements of the fundamental constitutional rights, that both the United States Constitution and the Compact would be violated. The above test would not narrow the application of the fundamental rights of the people of Puerto Rico but

[6] There are now two cases before this Court which deal with the extension of the holdings in *Sugarman* v. *Dougall,* 413 U.S. 634 (1973), 37 L. Ed. 2d 910, 93 S. Ct. 2842, and *In Re Griffiths, supra,* to the Federal Government under the Fifth Amendment. *Wong Sun* v. *Hampton,* 500 F.2d 1031 (9 CA 1974), *cert. granted* 41 L. Ed. 2d 664, and *Ramos* v. *U.S. Civil Service Comm.,* 376 F. Supp. 361 (DPR 1974), appeal filed, 43 LW 3173. These cases might serve to clarify the scope of the prior holdings.

would rather recognize the relationship between the Compact and the applicable provisions of the United States Constitution.

If the above test were to be applied, then the District Court should have found that the statute involved reasonable means to achieve legitimate local interests or that there was a rational basis for the statute.

The District Court did not consider the special and unique situation of Puerto Rico in regard to the nature of the alien problem. The latest official information is that there are over fifty-four thousand aliens in Puerto Rico. Most of these aliens come from Spanish-speaking countries. Due to the common language, same cultural and historical background, same kind of climate, geography, and better educational and economic facilities in Puerto Rico, than in their orginal countries, these aliens tend to come to the Island rather than going to the other States where they would confront different conditions. If the Court considers that at the present time the Commonwealth if confronting serious overpopulation[7] and economic problems, especially in connection with its unemployment figure,

[7] The 1970 Census Report shows that the small island of Puerto Rico has a population 2,712,033 persons of which 52,792 are foreign born. (1970 Census Population, Detailed Characteristics, Puerto Rico, a United States Department of Commerce Publication; Table 110, page 52-601.) 851, 247,000 live in the San Juan metropolitan area, which has 43,264 foreign born. Id, at 53-603. This is due to the geography of the island and that the government and business concentrations are in this area. It should be noted that the vast majority of the foreign born are from Spanish-speaking countries. For example, there are 26,000 persons born in Cuba, 10,843 born in the Dominican Republic, 4,120 from Spain and 1,269 from Venezuela. Id. Table 112 at 53-621. There were in 1970, 5,800 Cubans living in the San Juan area. Id. 53-622.

which is almost double the national one,[8] that the per capita income is $1,834,[9] and that 76.5% of the basic food products and commodities have to be imported, thus causing generally higher prices, then the Court most find that the statute is valid and necessary. We submit that the above situation clearly establishes that the Commonwealth has either a compelling interest or a legitimate one in trying to partially control the negative effects of an uncontrolled influx of aliens into professions which can be legitimately regulated by the State, due to their impact in the public and the economy.

This is particularly so in the case of engineers, architects and surveyors, who play a major role in the industrial and economic expansion in the island. Construction is one of the first industries in Puerto Rico, both in the private and public sectors. That is why the Civil Code has always tried to protect those citizens who might suffer injuries due to construction defects and enacted Article 1483 of the Civil Code.[10] Also the Commonwealth has a duty to assure the citizenry that these professionals who are daily entering into contracts worth millions of dollars, have a sufficient in-

[8] The latest official figure is 17% of the labor force. But it is suspected that the real figures come close to 30%. These problems are compounded by the vast numbers of illegal aliens who enter into the island without adequate control by the federal immigration authorities.

[9] This is far less than the per capita income of the poorest state of the United States, Mississippi, which had approximately $3,000.

[10] See also the statutory scheme which gives the Secretary of the Department of Consumer Affairs the duty to regulate, impose fines, etc. on constructors who fail to live up to their obligations. 17 L.P.R.A. 501 to 519, as amended by Law 116 of June 7, 1963 (1974 Cumulative Pocket Supp., 17 L.P.R.A. 516 at page 6) These protections might also be affected by the decision herein.

terest in remaining in the island so they can be held accountable and responsible for their tortious or illegal acts. Obviously if aliens are permitted to practice the professions herein involved without any limitations, serious problem affecting the citizenry as a whole may arise.[11] For examples of opinions dealing with the engineering profession in P.R., see *Rasa Eng. Corp.* v. *Daubón,* 86 PRR 182 (1962), and *Pereira* v. *I.B.E.C.* 95 PRR 28 (1967).

We also submit that the decision in *Espinosa* v. *Farah Manufacturing Co., Inc.,* 414 U.S. 86, 38 L.Ed. 2d 287, 94 S.Ct. 334 (1973), tends to undermine the rationale in the *Sugarman* and *Griffiths* cases. *Espinosa* gives an almost absolut discretion to private employers in their hiring practices. Although it is true that *Espinosa* only interprets a federal statute, it will have far reaching effects. And the *Sugarman* and *Griffiths* effects might be further undermined if this Court rules in favor of the federal government in the cases now pending before it. (*Hampton* and *Ramos, supra*)

We repeat that in Puerto Rico the appropriate test should be that of a rational basis for legislation, in which case any valid interest would sustain the statute.

[11] It should be noted that appellees are not prohibited from practicing their profession. Under the statute they can and are presently employed by government agencies. The statute also provides that those aliens who study their career in Puerto Rico have the right to seek an unrestricted license. Thus, unlike the *Sugarman* situation, there is no undiscriminate prohibition. The legislators obviously thought that the evils to be corrected are not present in these two situations. The government engineers, etc., are only employees in public works and have an extensive supervision. The ones that complete their full studies in Puerto Rico have an interest in remaining in the island and they are already part of the community.

Dandridge v. *Williams,* 397 U.S. 471, 25 L.Ed. 2d 491, 90 S.Ct. 1153 (1970). But even if the compelling state interest test is used, the statute should be upheld.

CONCLUSION

WHEREFORE, Appellants respectfully submit that the judgments in this case should be reversed and that the District Court for the District of Puerto Rico should be ordered to dismiss the complaints.

San Juan, Puerto Rico, on this 14th day of July, 1975.

MIRIAM NAVEIRA DE RODON
Solicitor General

PETER ORTIZ
Deputy Solicitor General